

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA  
LAS VEGAS, NEVADA

KABINS FAMILY LIMITED )  
PARTNERSHIP, et al., ) CASE No. 2:09-CV-1125-PMP-RJJ  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
CHAIN CONSORTIUM, et al., )  
 )  
Defendant. ) Las Vegas, Nevada  
 ) October 30, 2009  
 ) 9:41 a.m.  
And related cases and parties)

**PORTION OF HEARING ON MOTIONS  
ARGUMENTS OF ALBERT MASSI**

THE HONORABLE PHILIP M. PRO PRESIDING  
DISTRICT JUDGE OF THE U.S. DISTRICT COURT

COURT RECORDER:

ARACELI BARENG  
U.S. District Court

Proceedings recorded by electronic sound recording, transcript  
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2:09-CV-1125-PMP-RJJ Kabins v. Chain 10/30/09 **Motions**  
**Massi's Argument**

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(Continued)

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1 LAS VEGAS, NEVADA FRIDAY, OCTOBER 30, 2009

2 PROCEEDINGS IN PROGRESS AT 9:45:19 A.M.

3 MR. MASSI: If I may, Your Honor.

4 My name is Al Massi and I represent three of the  
5 named defendants, Your Honor, Benessere, LLC --

6 THE COURT: Yes.

7 MR. MASSI: -- Gila Bend, LLC, and Cipriani, LLC.

8 Addressing your first question, I think so far as  
9 my clients and our motion today, I don't believe it should  
10 impact our motion.

11 THE COURT: Mm-hmm.

12 MR. MASSI: Certainly if the Court does not  
13 disclose to grant our motion, it's going to interfere at  
14 some point with discovery as it relates, because we're going  
15 to have to get involved in cross claims and probably third  
16 party complaints, and there's going to be a myriad of other  
17 people probably filing actions behind it if these people have  
18 standing, so --

19 THE COURT: And I'm sure the Chains figure  
20 prominently in any of that.

21 MR. MASSI: As it relates to discovery, certainly,  
22 Your Honor.

23 THE COURT: Although the bankruptcy stay wouldn't  
24 stay --

25 MR. MASSI: No.

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1 THE COURT: -- them sitting for deposition for  
2 discovery, would it?

3 MR. MASSI: No, there's no crime charged yet.

4 THE COURT: Yeah.

5 MR. MASSI: So I don't --

6 THE COURT: No, no. I mean they've got no -- the  
7 bankruptcy automatic stay wouldn't mean they couldn't give  
8 evidence.

9 MR. MASSI: I think they could. They could engage  
10 and I think can get -- I think it's called a 341 exam through  
11 bankruptcy court we're entitled to.

12 So far as the state court, that was part of our  
13 motion, Your Honor. We were alerting the Court to the fact  
14 that we have a pending state court action. Part of our  
15 request was to this dismissal and their ability to go  
16 intervene in that if they wish.

17 So to the extent that the state court action  
18 exists, it will continue. And so far as discovery, I don't  
19 think it would be stopped by this. It would be an  
20 inconvenience but not something that would --

21 THE COURT: Right.

22 MR. MASSI: -- prevent us from doing so --

23 THE COURT: Okay.

24 MR. MASSI: -- as against the Chains.

25 THE COURT: Yeah.

\* \* \* \* \*

(Proceedings continued and not transcribed  
from 9:46:38 a.m. until 9:57:20 a.m.)

\* \* \* \* \*

(Proceedings continued at 9:57:20 a.m.)

THE COURT: Let -- before I hear from you Mr. Gibson, it might be better to hear from Mr. Massi on his motion -- on the motions to dismiss. That way you can -- because I think there's a certain common thread running through these and it would help to just get a comprehensive response. We've also got of course --

MR. MASSI: Thank you, Your Honor.

THE COURT: -- the motions to set aside the defaults. And let me just say it, and I want to hear you individually on these, but the proximity and time is such that I think you can probably anticipate my desires to try and get this resolved on the merits. And while I realize there may have been some 21<sup>st</sup> to the 24<sup>th</sup>, I can't remember the exact days as I sit here, but you all can argue that, that my -- my strong inclination, unless there's some reason I really shouldn't is to set those aside and get this thing at issue on the merits is really my preference.

But go ahead, Mr. Massi. Let me -- let me hear from you on the --

MR. MASSI: Thank you, Your Honor. And --

1 THE COURT: -- Benessere, Cipriani, Gila Bend and  
2 Buckeye --

3 MR. MASSI: Buckeye 80.

4 THE COURT: Buckeye 80. Yeah.

5 MR. MASSI: And also Canamex, Your Honor. And I  
6 represent them --

7 THE COURT: Yeah, and Canamex. Yeah.

8 MR. MASSI: -- I represent them along with Mr.  
9 Bowers and Mr. Clark, who are both here in the courtroom this  
10 morning.

11 Your Honor, before I begin, and I'll try and be as  
12 brief as possible once I begin. Is there any particular  
13 area you want me to address as it relates just to my motion,  
14 because I want to be as distinct as I can in addressing the  
15 Court and advising the Court that I have no interest in any  
16 of the other parties. The individuals don't represent them,  
17 don't want to defend their position, only my clients. And  
18 as it relates to my clients, the LLCs, is there any  
19 particular --

20 THE COURT: Well, amplify for me first a little bit  
21 about the state proceeding. What -- does that involve all of  
22 the same people or some of the same people?

23 MR. MASSI: Many of the same people, Your Honor.  
24 We initiated an action, and I mean we as in myself and other  
25 individual investors, initiated an action in state court

1 alleging many of the same, if not all of the same -- well,  
2 no, it wasn't 156 pages, but it was many of the same actions,  
3 RICO and conversion and embezzlement --

4 THE COURT: And who are the defendants in that  
5 case?

6 MR. MASSI: Jeff Chain, Ed Gutzman, Jim Main, who's  
7 the CPA or accountant who handled these --

8 THE COURT: Okay.

9 MR. MASSI: -- these matters and others. That is  
10 pending before Judge Gonzalez. As a result of that action --

11 THE COURT: Now what's the gravamen of your claims  
12 against Chain, et al., in that case?

13 MR. MASSI: Some of the specific allegations is  
14 that he took money from the entities --

15 THE COURT: The investors. Yeah.

16 MR. MASSI: -- used it for himself, and then when  
17 found out, paid it back with interest that he decided was  
18 appropriate, or Mr. Gutzman, or them together decided is  
19 appropriate.

20 But in essence, Judge, we say he embezzled. He took  
21 the money without our permission. He took it, used it for  
22 other -- we don't even know yet what for.

23 THE COURT: So it's not an allegation of some overt  
24 Ponzi kind of scheme where they're taking --

25 MR. MASSI: No, sir.



1 THE COURT: Okay.

2 MR. MASSI: No. This is -- you know, to get to  
3 that area, and to perhaps fill you in on a little background.  
4 Mr. Gutzman and Mr. Chain several years ago, I think it's  
5 about five now, came to many people around town, and  
6 understand that in Cipriani alone I believe there's over 200  
7 investors. That's some of the commonality that does not  
8 exist in this, Judge, and something that's important, I  
9 believe.

10 Cipriani, hundreds, literally excess of 200.  
11 Benessere, over 100 I believe. Gila Bend, not as many.  
12 These other entities, these other smaller entities were,  
13 what I refer to as private deals between Mr. Chain, Mr.  
14 Gutzman, and some preferred -- apparently preferred investors.  
15 To that end, they went down to Arizona. They assembled  
16 property in separate LLCs, dozens of them, in an area south  
17 of the 10, west of Phoenix initially, which is referred to as  
18 Buckeye.

19 THE COURT: Okay.

20 MR. MASSI: So at one point this Buckeye assemblage  
21 was subsumed into one LLC called Cipriani, some 20 -- about  
22 2,400 acres, I believe.

23 THE COURT: All right.

24 MR. MASSI: Second area was Benessere, which is  
25 further east and closer to Phoenix along the -- I think it's

1 called the Can-Mex Highway, or fronts -- part of it fronts on  
2 that. And that I believe is in excess of 1,000 acres.  
3 Several -- dozens and dozens, if not over 100 investors. And  
4 counsel can correct me as to the number, but certainly dozens  
5 of investors in Buckeye -- Benessere, I'm sorry.

6 And that, as I said, was over 1,000 acres, that  
7 assemblage. All of those separate LLCs were subsumed into  
8 the Benessere, LLC. Then south and west into Gila Bend,  
9 literally a corner, about 300 and some acres.

10 THE COURT: All right.

11 MR. MASSI: Not as many investors, perhaps a dozen,  
12 10, 12 investors, and there was only one LLC and that's Gila  
13 Bend.

14 Those are our three primary clients. The Buckeye  
15 80 and Can-Mex were subsumed into Cipriani or Benessere,  
16 depending on the case. And we move forward under the  
17 umbrella of those three LLCs, Judge.

18 This investment -- these investments, these three  
19 that I represent, that we represent, are all very liquid.  
20 Not only are they liquid, there's no reason for us to assume  
21 at this point that they aren't worth at least what we paid for  
22 them. Clearly they're not worth what they were worth two or  
23 three years ago.

24 THE COURT: Right.

25 MR. MASSI: Virtually no investment is. And that

1 happens.

2 That to be distinguished, Your Honor, from these --  
3 all these other investments that Dr. Kabins made with Mr.  
4 Gutzman, Mr. Chain, Mr. Martinez and others, that are upside  
5 down, under water, in foreclosure, in serious trouble. None  
6 of those have assets.

7 And one of our primary -- aside from the technical  
8 legal argument that we've made under Sparling [phonetic] and  
9 other cases that we've cited to the Court, one of the first  
10 subjects I want to broach with you is the fact that we have a  
11 claimant, Dr. Kabins, who made himself, as you know  
12 transferred these to the trust and wants to collect his  
13 damages, his losses on these investments, for his losses in  
14 these other corporations, LLCs, from my clients, who are  
15 liquid. And we were discussing in the office, and I -- and I  
16 stopped and I said, wait a second, If I invested in Apple two  
17 years ago and I invested in GM two years ago, with GM stock I  
18 can now buy a Happy Meal, and with Apple I can buy a GM car.

19 THE COURT: Mm-hmm.

20 MR. MASSI: I can't sue Apple because I lost money  
21 on GM, and that's what they're trying to do.

22 You have an investor, Dr. Kabins, who, as part of  
23 his defense, and I go -- unless you have specific question to  
24 the two primary areas of argument I wanted to make, Judge.

25 THE COURT: Go ahead.

1 MR. MASSI: And that is the RICO, first, the RICO  
2 allegation. And I've had the good fortune or misfortune of  
3 reading many of them over the years for the U.S. Attorney's  
4 Office, and more complex --

5 THE COURT: Mm-hmm.

6 MR. MASSI: -- and better pled, candidly. The fact  
7 of the matter is, there's no standing, we believe, for Dr.  
8 Kabins in this RICO action.

9 The Sparling case we believe is pivotal because the  
10 distinguishing factors in the 1962(c), there's no injury that  
11 Dr. Kabins, and derivatively people he transferred to, but  
12 for purposes of my argument today, if I may I'll just address  
13 Dr. Kabins.

14 THE COURT: All right.

15 MR. MASSI: He has no injury distinct from any of  
16 the other investors. He has no special duty owed him by the  
17 corporation. He has -- he has no individual right as a  
18 shareholder to bring this action derivatively. It is the  
19 corporation's action.

20 The corporation, the LLC, Judge, are as much a  
21 victim or more of a victim than he. The corporation itself  
22 did nothing wrong. And we addressed and in fact quoted from  
23 the operating agreement for you where it distinctly says  
24 under the indemnification section and another that if the  
25 managers, manger or managers, do something inappropriate,

1 fraud or misrepresentation, that's outside of their authority.  
2 We gave them no authority in the operating agreement to act  
3 as they did, if they did. And I'm not saying one way or  
4 another here that they have. But I'm saying if they did they  
5 had no authority and, therefore, they -- you cannot define  
6 these LLCs for purposes of RICO as an aggressor corporation.  
7 And that's the Starfish decision.

8           The Starfish decision indicates that each defendant,  
9 each one of my LLCs that I represent, had to engage in a  
10 pattern of RICO activity individually and separately with Dr.  
11 Kabins. Additionally, each of these corporations had to know  
12 or should have known that this was occurring. The members,  
13 and the members did nothing.

14           If, Judge, under RICO Dr. Kabins has standing to  
15 bring this action, and the Court finds that yes, Doctor, you  
16 can do this, then I believe respectfully what the Court would  
17 be saying to 200 plus investors is, ladies and gentlemen, you  
18 all have an independent right to sue your LLC under RICO  
19 because they are all, all of the investors, are in the exact  
20 same position as Dr. Kabins. So how is he unique?

21           The only difference that we can find between Dr.  
22 Kabins and all the rest of the investors is, he had a special  
23 deal. And the special deal was that in October of '08 he  
24 received from Mr. Chain, I don't know if Mr. Gutzman knew or  
25 didn't know about it, but I know Mr. Chain signed it, and we

1 referenced it in our motion.

2 He received a special promise, and that special  
3 promise was that he would not lose his principal ever in any  
4 of his investments, Judge. He was treated totally separate  
5 by Mr. Chain. Not by the LLC, not with the knowledge of the  
6 members.

7 So he comes before you and says I have standing to  
8 bring an action for RICO, and yet he literally conspired with  
9 the manager he is suing to gain an advantage against co-  
10 members that he is now suing, and perhaps most unique, he's  
11 suing himself because he's a member of the LLC. He's bringing  
12 an action against himself for misrepresenting to himself, I  
13 guess is the address [sic].

14 The other thing is that he, along with Mr. Chain  
15 and others, and I suggest the other manager, Mr. Gutzman,  
16 went into other deals that could have been offered to other  
17 members of the LLC -- LLCs, but they did them themselves. And  
18 these separate deals are these other ones that are all under  
19 water. And these were -- they had their connections, they  
20 had their contacts because of the development of Cipriani and  
21 Benessere. And now they were in action and things were  
22 growing and everything was skyrocketing and the world would  
23 always be perfect, and so let's grab this, flip it and we'll  
24 make this much ourselves over here, and they used the  
25 contacts they developed for all the regular investors over

1 here.

2 So not only is he not distinct or unique, he took  
3 an advantage that none of the rest of the people had. How  
4 does that provide him standing individually under -- under  
5 Sparling. How do you define the LLCs as aggressor, you know,  
6 under Starfish -- or I'm sorry, under Degus [phonetic], to  
7 permit him to bring this action. The fact of the matter is  
8 that RICO does not exist here.

9 The other thing too, Judge, is that state RICO  
10 exists. You know, we're going to get into Younger I suspect  
11 by way of argument. State RICO exists. We have it. It's  
12 great. Like all of our rules in state court --

13 THE COURT: Right.

14 MR. MASSI: -- we copied the federal rules, we  
15 copied the federal statutes, and it exists there. So as to --  
16 as to RICO, Judge, we believe there is no standing.

17 As to securities, the statute of limitations is  
18 gone. Now counsel's argued on behalf of his client that he  
19 didn't know because he didn't read the documents. He's an  
20 orthopedic surgeon. We know he can read, write, and speak  
21 the English language. He invested 11 million dollars. I  
22 mean this in the most charitable way possible, dumb is not a  
23 defense. Not reading documents on 11 million dollars worth  
24 of investments is not a defense.

25 He comes before you and he says Mr. Chain, Mr.

1 Gutzman --

2 THE COURT: Only the U.S. Government does something  
3 like that.

4 [Laughter]

5 MR. MASSI: I heard something funny about the  
6 government yesterday I have to share with you, Judge.

7 THE COURT: A lot of things from the --

8 MR. MASSI: I watched a little bit about Neil Cavuto  
9 yesterday and he was talking about reading the bill, the  
10 health care bill, and he had speed reader on, reads 30,000  
11 words a minute. He said the average person reads 200 words a  
12 minute, the average congressman 20. And let's --

13 [Laughter]

14 MR. MASSI: -- read this. And it struck me as funny  
15 at the time. You had to be there, I guess.

16 In any case, he -- he comes before you saying I  
17 invested 11 million dollars, but I didn't read the document.  
18 They told me X before I got the documents. X I find out now  
19 is not true. If he had read the documents two things would  
20 have occurred, Judge. One, he would have had actual -- the  
21 actual notice. He had inquiry notice. That's his  
22 responsibility --

23 THE COURT: Mm-hmm.

24 MR. MASSI: -- under the Securities Act. And two,  
25 he would have had actual notice that what he says they told



1 him that was a misrepresentation was, in fact, represented in  
2 these documents, i.e., they were going to take a 5 percent  
3 broker's commission and other things. Those things he  
4 complains of. If he had read it, he would have known it, and  
5 I think that is imputed to the entities that now  
6 [unintelligible].

7           Additionally as to securities, counsel did  
8 initially, and I believe has withdrawn this position, pled  
9 securities violation as a predicate act to RICO, which it is  
10 not. So we have the two first and primary -- primary  
11 actions. The RICO, which we believe he has no standing on,  
12 and the second is the securities. And interestingly on the  
13 securities the only example that counsel cites on securities  
14 fraud is addressed the 99 LLC, which has nothing to do with  
15 my clients. And the vast majority of it has nothing to do  
16 with it.

17           One other thing that Dr. Kabins has done that  
18 demonstrates his own lack of participation and therefore  
19 vulnerability, not distinguishing him from anyone else, not  
20 making him a special case or entitling him to special relief  
21 under RICO, his securities is he -- I advised his counsel  
22 months ago, and I was really trying to pin it down, and I  
23 have to represent to you at least eight months ago, and had a  
24 meeting with two of his counsel in my office in May, saying  
25 let's remove Eddie Gutzman as the manager. Vote with us to

1 do that. We had a meeting on Cipriani last year, last  
2 September, asking and inviting Dr. Kabins to vote with us to  
3 remove Mr. Gutzman.

4           You see, as a matter -- as a result of the state  
5 court action, Your Honor, I was able to get Mr. Chain to  
6 resign from all three of these entities that I represent, and  
7 have him surrender his 10 percent interest that he got in  
8 them as a fee for putting together what he put together, in  
9 addition to the buyer's commission.

10           So Chain, for our purposes, is no longer a member  
11 of these LLCs, not entitled to anything, and no longer a  
12 manager. Only Eddie Gutzman is and he still maintains his 10  
13 percent.

14           I said let's remove him as a manager. In Gila Bend  
15 we only -- he owned like 26 percent. I said he puts us over  
16 the top. 60 percent's required.

17           In Cipriani we were 3 percent or 4 percent away.  
18 He voted with Mr. Gutzman on Cipriani, and he has, to this  
19 day, not voted with us to remove Mr. Gutzman on Gila Bend.  
20 But he comes before you and says Mr. Gutzman misrepresented  
21 to me.

22           Now I'm not really sure how consistent he can be in  
23 other things, but that certainly is a terribly inconsistent  
24 position. If he has committed a fraud, if he has  
25 misrepresented, if he has done these things he says he has

1 done, remove him. Vote with us to remove him.

2 He again is trying to put himself in a separate  
3 category, separate and apart from the other investors, with  
4 some entitlement that we don't have, or my clients don't have  
5 as -- [coughing] -- to which he's not entitled, not giving  
6 him special permission, special place in the RICO or in  
7 securities.

8 The other actions, Your Honor, that form the  
9 gravamen of Dr. Kabins' complaint are the state court actions,  
10 and I'll summarize some, fraud, conversion, negligent  
11 misrepresentation, negligent performance -- and I apologize  
12 for looking down while I'm addressing you -- unjust  
13 enrichment, promissary estoppel. Going down the list, fraud  
14 has a three year statute of limitations. And I apologize --  
15 let me backtrack just one moment. I started to broach that  
16 subject and thought about Neil Cavuto and got off track.

17 The statute of limitations and securities is three  
18 years. He signed these operating agreements, Judge, in  
19 November 20<sup>th</sup>, '04 was the first. That was Benessere. I  
20 believe Cipriani, May 25<sup>th</sup>, '05. Gila Bend, May 25<sup>th</sup>, '05.  
21 Long past the three year statute -- the two year statute of  
22 limitations for securities fraud.

23 So the statute has run. He was on -- inquiring  
24 actual notice. He represented over his signature that he  
25 had gotten the advice of tax counsel, that he was a

1 sophisticated investor and spoke with his lawyer, all three  
2 of these.

3 Back to the statute of limitations. The statute of  
4 limitations on fraud is three years in the State of Nevada.  
5 On his conversion action, to demonstrate conversion he's got  
6 to demonstrate wrongful dominion. There's no -- been no  
7 wrongful dominion. Everyone owes -- owns what they own. My  
8 clients simply hold title on behalf of their shareholders.  
9 There's been no control by the LLC over Dr. Kabins' shares  
10 separate and apart from everyone elses.

11 The negligent misrepresentation, he acknowledges  
12 that he received the information. He didn't read it. You  
13 know, so how -- he was the one who was negligent, not the --  
14 not the LLCs.

15 Negligent performance, it's an improper derivative  
16 claim. He cannot have improper -- improper performance as a  
17 direct claim. It's a derivative claim the corporation has to  
18 bring.

19 Unjust enrichment, there's a contract. You don't  
20 have unjust enrichment when you have a contract as a basis  
21 for an action. And to get the promissary estoppel you have  
22 to be ignorant of the true facts. And if he had picked up  
23 the paper and read the papers he was given he wouldn't have  
24 been ignorant of the true facts.

25 He has chosen not to join us in the state action a

1 year ago when it was filed. He had the opportunity to and  
2 was invited to. He chose not to vote with us. I respectfully  
3 submit, Your Honor, that he has no standing under RICO, that  
4 the statute's gone under securities, and the state action  
5 don't.

6 So far as what I know I'm going to hear on Younger,  
7 you know, we know the four criteria that are going to be  
8 argued. The state action is ongoing. The proceeding  
9 implicates important state actions. We do. Corporations are  
10 entities that need protection. The federal claim is not  
11 barred from litigating federal constitutional issues. The  
12 state court is not. We haven't. And the federal action  
13 will interfere with the state. And my primary concern there,  
14 Judge, in all due respect is we could end up with  
15 inconsistent results. You're going to have two separate  
16 actions that could result in separate -- separate results  
17 against the same parties virtually arguing the same things.  
18 Nothing prevents them from [unintelligible].

19 And finally and most important, Judge, these LLCs  
20 have done nothing inappropriate as entities. I'm not speaking  
21 to what the managers may have done or others involved, but so  
22 far as my clients, Your Honor, there is no cause of action.  
23 And perhaps most importantly, this relates to my clients, Dr.  
24 Kabins hasn't suffered any damages. His investments are worth  
25 what they were worth when he bought them.

1 Thank you for your time.

2 THE COURT: All right, thank you. Thank you.

3 \* \* \* \* \*

4 (Proceedings continued and not transcribed  
5 from 10:16:12 a.m. until 11:09:54 a.m.)

6 \* \* \* \* \*

7 (Proceedings continued at 11:09:54 a.m.)

8 THE COURT: Mr. Massi.

9 MR. MASSI: Thank you, Judge.

10 And I'll try and address each of counsel' points as  
11 briefly as possible.

12 Regarding the Chain Consortium, how can I be a  
13 partner with someone that I don't know I'm a partner with? I  
14 don't want to get into the specific statutes, I'd just like  
15 to address the practicality of it. You know, does that mean  
16 that you and I can be a partner but we don't know we're  
17 partners in something? Of course not.

18 The fact of the matter is, that there has to be  
19 some agreement among partners to be a partner. And again,  
20 all my comments are addressed only to my three LLCs that I  
21 represent. None of my LLCs have agreed to be a partner with  
22 Jeff Chain and anything else. And in fact, Mr. Chain, Mr.  
23 Gutzman and others, including Dr. Kabins, had secret  
24 agreements and secret -- secret investments that none of my  
25 clients had the benefit of or were advised of.

1           The second is, the one thing I absolutely agree  
2 with counsel on, and I quote him from a statement just made in  
3 his response to you. And the quote is:

4           "All they have to do is read it, Your Honor, and  
5 they will be fine."

6           Referencing us, that is my clients reading the  
7 complaint and we'll be fine because we'll understand  
8 everything. You know what, I agree with him. If you read  
9 it, you'll be fine, and that's exactly what Dr. Kabins  
10 should have done. He should have read the operating  
11 agreements and he would have been fine, because he would have  
12 found in Cipriani's operating agreement that it says in part  
13 the limitation of manager's liability. There's a limitation  
14 unless some act or omission was performed or omitted  
15 negligently, intentionally, or fraudulently.

16           Additionally, there's indemnity if the acts were not  
17 performed or omitted fraudulently or in bad faith. We're not  
18 in violation of fiduciary obligation.

19           In Benessere there's limitation unless there's an  
20 act or omission performed negligently, intentionally, or  
21 fraudulently and the same occurred with the indemnity.

22           And in Gila Bend specifically, that so long as they  
23 act in good faith and without willful misconduct, in each of  
24 these operating agreements the members, as a group, having  
25 structured these operating agreements, said we'll cover you,

1 you'll part of us, so long as you don't do this. If you do  
2 it you're not acting for us, you may be acting independently.  
3 And I have no complaint, I have no problem, he can sue anybody  
4 individually he wants to sue on behalf of Dr. Kabins.

5 I'm not saying or representing to you that they may  
6 or may not have said the things Dr. Kabins said they said.  
7 They may have, but my clients didn't. And if they -- if  
8 these individuals, while a manager or managers of my client's  
9 LLCs, said -- they said them without the authority of the LLC,  
10 and in violation of the operating agreement are entitled to  
11 no defense.

12 Most importantly, Judge, what they did we did not.  
13 My LLCs don't have leverage. There's one -- Cipriani was  
14 approximately 44 million cash everyone put in. The only debt  
15 is about a million plus on a bank loan that's being negotiated  
16 now and handled, but it's a million dollars on a 44 million  
17 investment. The rest -- the land is free and clear.

18 Benessere there's one leveraged. Out of 1,300 to  
19 1,400 acres there's about 300 acres. The total purchase I  
20 think was about 8 million, and approximately 5 million of it  
21 has been paid in cash.

22 Gila Bend, nothing is owed.

23 So you have tens of millions of dollars in these  
24 three LLCs that counsel's going after that Dr. Kabins wants  
25 for himself as an investor, asking for treble damages in



1 RICO, taking from all these other members their investment  
2 because he feels he's specially suited, because he has --  
3 entitled to some special care or treatment.

4 In fact, he obviously thought he was because it's  
5 document 112, Your Honor, a letter, October 27<sup>th</sup>, 2008, to  
6 Dr. Kabins from Jeff Chain saying in regards to these  
7 investments, and he lists all the 11 million investments.  
8 Jeff Chain, Millennium Properties guarantees that there will  
9 be not a loss of principle upon completion of each project.  
10 In the case that occurs, Jeff Chain and Millennium will make  
11 up the difference between the initial capital and capital  
12 invested.

13 And then he goes on to say, as this is a very  
14 serious offer, it's agreed between the parties that this --  
15 that this individual -- this is individual to Dr. Mark Kabins  
16 and not to any other investors. And all parties agree that  
17 the terms of this agreement are to remain strictly  
18 confidential as it would greatly impair the ability to honor  
19 if other claims are also made of a similar manner.

20 This is what Dr. Kabins was doing while he accuses  
21 my clients of committing a fraud or perpetrating fraud on  
22 him. You know, where is there -- what damage has my clients  
23 -- have my clients caused him? I don't know that he's  
24 suffered any damage anyway, but in particular, what have they  
25 done?

1           The -- counsel talks about my misquoting Betts  
2 [phonetic], and I'm going to quote from my brief and from  
3 Betts because I respectfully suggest, Your Honor, counsel's  
4 got it backwards. This is what we said in the -- in the  
5 Betts decision, and in Starfish. But let me -- bear with me  
6 one moment, Your Honor. I must have left it on the desk.  
7 I'll be right back.

8           THE COURT: All right.

9           MR. MASSI: Do you have it? Do you have it? Do you  
10 have it?

11           UNKNOWN SPEAKER: Here it is.

12           MR. MASSI: Well, when I find it I'll address it.

13           THE COURT: All right.

14           MR. MASSI: Let me go to the other cases, Judge.  
15 What I said, and each of the was cited exactly the way the  
16 Court cited them. Starfish, the Starfish case says 1962,  
17 subsection (b).

18           "Starfish must allege that each defendant -- each  
19 defendant, through a pattern of racketeering activity,  
20 buy [sic] maintain any interest or control of any  
21 enterprise which was engaged in" -- and thank you, John  
22 -- "interstate or foreign commerce.

23           That's exactly what Starfish says. That's exactly  
24 what we said.

25           And Sparling says:

1           "The Sparlings must show either an injury distinct  
2           from that to other shareholders, or a special duty  
3           between Hoffman and the Sparlings if they are to have  
4           standing to assert RICO claims based on injuries."

5           And Degus says -- Dagus says:

6           "RICO draws significant distinction between the  
7           aggressor enterprise, legitimate or illegitimate. An  
8           infiltrated or injured enterprises here affirms only be  
9           characterized as conduits through which Chapman conducted  
10          his [unintelligible] themselves victims of the ongoing  
11          rule infraction by an employee."

12          That's exactly the situation, and I think all were  
13          properly quoted.

14          The Betts argument, Dr. Kabins argues that the LLC  
15          defendants relied on a dissenting opinion. We did not. We  
16          cited the opinion of the Court, not the dissenter. Okay.  
17          And no dissent was cited in any of our -- any of our  
18          arguments.

19          The properties that I represent are not in  
20          foreclosure.

21          The Betts case dictates that the -- or the Betts  
22          case as cited, was cited for the purpose of indicating to the  
23          Court that any of these representations that Dr. Kabins  
24          suggest were made, were made before the operating agreements  
25          were signed, before he was given actual notice, before he had

1 at least inquiry of those [sic].

2 And he also has held, Judge, under Betts, to the  
3 reasonable investor standard, he has a duty to investigate.  
4 That's Matthews versus Kidder. We also cited that case.

5 The K-1s that were given were given accurately. In  
6 fact, Judge, when you look at them, we attached them as an  
7 exhibit. The K-1s showed the diminution in percentage  
8 ownership. And I do this by way of example because I don't  
9 have the numbers in front of me.

10 But pose a hypothetical, Dr., Kabins owned 26  
11 percent of Gila Bend. Part of the deal was on the sale, Mr.  
12 Gutzman and Mr. Chain would receive 10 percent of the net  
13 after expenses. So there's classic Class B shares. Class A  
14 people put cash in, Class B, Gutzman, Chain.

15 Well, the K-1s showed, if Dr. Kabins invested 25 --  
16 or owned 25 percent, because of the shares that Gutzman and  
17 Chain had a right to, his 25 percent was probably 22 and a  
18 half percent, taking a proportionate reduction with all the  
19 other investors. So the K-1s were absolutely accurate.

20 Additionally, he has never asked for an accounting  
21 to this day. He's never asked to look at a financial  
22 statement. He's done nothing that would have -- would've  
23 suggested he wasn't on actual notice of what's happened.

24 And he doesn't answer you when I asked the question,  
25 if Gutzman did these things to you, why didn't you move to

1 remove him? Why didn't you vote with us to remove him? Why  
2 didn't you join us in the state court action? Why didn't you  
3 do something, you know, that indicated that you were damaged  
4 or harmed before now?

5 You know, 8(d) requires a short plain statement,  
6 fraud has to be particular. The separate entities, these  
7 separate entities have to continue to be treated separately.  
8 Counsel says as a corporate lawyer his advise is, not the  
9 partnership, construct and create separate entities. And  
10 that's --

11 THE COURT: I forgot to ask, when was that state  
12 court action filed? How far down the road is it?

13 MR. MASSI: It's a year down the road, Judge. We're  
14 before Judge Gonzalez in business court.

15 THE COURT: So discovery is already --

16 MR. MASSI: Oh yes. In fact, we have a mandatory  
17 settlement conference -- I want to say it's January 5<sup>th</sup> or 6<sup>th</sup>,  
18 right after the first of the year, Judge. We're to that  
19 stage. Oh, thanks, John. September 25<sup>th</sup>, '08 is when it was  
20 filed, Judge.

21 Ms. Frankewich is representing us in state court,  
22 the defendants are Mr. Chain, Gutzman, Cipriani Management,  
23 Jim Main. And the -- and as I said, it's a mandatory  
24 settlement conference in January.

25 The question -- the question again, Judge, begs to

1 be answered, and that is, you know, what did they do wrong?  
2 And why is he entitled to take from other innocent people  
3 their investment because that's what he's asking you for. I  
4 understand that the gentleman lost millions and millions of  
5 dollars in these other entities. I understand that he may  
6 have a legitimate claim against some people. But he has no  
7 right, and his -- and his attorney says create separate  
8 entities, be distinct, be separate. We are. We've done  
9 nothing, hurt him in no way, he's suffered no damage, and we  
10 respectfully suggest for those reasons and the reasons we've  
11 set forth in our brief that you do dismiss these claims,  
12 Judge --

13 THE COURT: All right.

14 MR. MASSI: -- as against my client.

15 THE COURT: Thank you, Mr. Massi.

16 MR. MASSI: Thank you, Judge.

17 THE COURT: Now let me --

18 MR. MASSI: Thank you for your time.

19 THE COURT: -- -- let me turn to other counsel on  
20 these other matters, the motions to set aside that they may  
21 have filed.

22 MR. MASSI: I apologize. Should I address that  
23 briefly, Judge --

24 THE COURT: Go ahead.

25 MR. MASSI: -- because I have -- I have --

1 THE COURT: I saw Mr. Bowers was standing too and  
2 others.

3 MR. MASSI: Yeah. I have Canamex and Buckeye 80 --

4 THE COURT: That's right.

5 MR. MASSI: -- as defendants, Judge. And as we  
6 argued in our motion, it was -- first of all, it was two  
7 dates. Secondly, they are subsumed. Thirdly, if -- we ask  
8 that the Court consider them as part of this motion.  
9 Regardless of how you rule, we will conduct ourselves  
10 accordingly. If you see -- don't see your way clear to  
11 dismiss us against -- against the primary three LLCs, then  
12 we'll be filing a responsive pleading on behalf of these two  
13 people -- or these two entities.

14 THE COURT: All right. Thank you, Mr. Massi.  
15 Mr. Bowers, any --

16 MR. MASSI: That was it, Your Honor. Thank you.

17 THE COURT: All right.

18 (Proceedings continued at 11:21:40 a.m.  
19 and not transcribed)

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**CERTIFICATION**

I (WE) CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

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